

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 PORTLAND DIVISION

4 UNITED STATES OF AMERICA, )

5 Plaintiff, )

Case No. 3:12-CV-2265-SI

6 v. )

July 18, 2013

7 CITY OF PORTLAND, )

8 Defendant. )

Portland, Oregon

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14 STATUS CONFERENCE

15 TRANSCRIPT OF PROCEEDINGS

16 BEFORE THE HONORABLE MICHAEL H. SIMON

17 UNITED STATES DISTRICT COURT JUDGE

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1 TRANSCRIPT OF PROCEEDINGS

2 DEPUTY COURTROOM CLERK: All rise.

3 THE COURT: Good morning. Good morning.

4 DEPUTY COURTROOM CLERK: Your Honor, this is the  
5 time set for Case No. CV-12-2265. USA v. City of Portland.  
6 Status conference. Appearing by telephone for plaintiff,  
7 USA, are Mr. Jonas Geissler.

8 Mr. Geissler, can you hear me?

9 MR. GEISLER: I can. Thank you.

10 DEPUTY COURTROOM CLERK: Thank you.

11 Mr. Jack Morse. Mr. Morse, can you hear me?

12 MR. MORSE: Yes, I can. Thank you.

13 THE COURT: And Ms. Laura Coon?

14 MS. COON: Good morning.

15 DEPUTY COURTROOM CLERK: Thank you. I will ask  
16 counsel in court, beginning with Ms. Brown, to please  
17 identify themselves for the record.

18 MS. BROWN: Thank you. Good morning, Your Honor.  
19 Adrian Brown for the United States.

20 MR. WILLIAMS: Good morning, Your Honor.  
21 Bill Williams for the United States.

22 MS. ALBIES: Good morning, Your Honor. J. Ashlee  
23 Albies for the AMA Coalition.

24 MS. CURPHEY: Good morning. Shauna Curphey for  
25 the AMA Coalition.

1 MR. KARIA: Good morning, Your Honor. Anil Karia,  
2 lawyer for the Portland Police Association.

3 THE COURT: Good morning.

4 MR. WOBORIL: Good morning, Judge. David Woboril  
5 for the City of Portland.

6 THE COURT: Good morning.

7 MS. OSOINACH: Good morning. Ellen Osoinach for  
8 the City of Portland.

9 THE COURT: Good morning, everyone. We are here  
10 in the status conference in this case and I have a number of  
11 questions that I'd like to ask, mostly to make sure we're  
12 all on the same page. But before we get into that I will  
13 tell you that I have read the status reports that everyone  
14 has filed. Dockets 41 and 43. I also recall that -- from  
15 one of our earlier orders, learning that the collective  
16 bargaining agreement between the Portland Police Association  
17 and the City was set to expire, by its own terms, on June  
18 30th, 2013; a few weeks ago. I'm unaware whether there were  
19 any extensions or how, if at all, that expiration might  
20 affect any of the issues that are before us. So to whatever  
21 extent you wish to address that early on, you're welcome.  
22 To the extent you want to wait until later, when we talk  
23 about where we're going in this case, you're welcome to do  
24 that, as well.

25 But let me ask, beginning with plaintiff, is there

1 anything you would like to add at this time to the status  
2 report that you filed?

3 MS. BROWN: Yes, Your Honor. Thank you. And I  
4 will refer to my colleague for the AMA Coalition, as well as  
5 the City of Portland, but we are happy to successfully  
6 report that we have reached an agreement between at least  
7 the AMA, City of Portland, and the US DOJ. I'll let my  
8 colleagues elaborate on that more, but it does need to be  
9 presented to city council. So it's not in final approved  
10 form. But it will not be something that's filed with the  
11 Court. But it is an agreement that all the parties, between  
12 the AMA, the US DOJ, and the City of Portland, will sign.

13 THE COURT: Excellent and congratulations.

14 MS. BROWN: Thank you.

15 THE COURT: Anything that -- I'll go next to the  
16 City of Portland, then I'll go to the Portland Police  
17 Association, and then to the AMA. Anything that the City of  
18 Portland wishes to add by way of status report or any other  
19 general comments now?

20 MS. OSOINACH: No. We'd like to thank you, first  
21 of all, for giving us the opportunity to engage in  
22 mediation. It was successful in regard to the AMA, and I  
23 want to thank them, in particular, for their persistence in  
24 working with us towards an agreement. As plaintiff said, we  
25 won't be filing it with the courts, but the City will be

1 filing an ordinance today authorizing the city council to  
2 enter an agreement, and that will be heard next week, on  
3 July 24th.

4 THE COURT: Very good, Ms. Osoinach.

5 Let's go next to Mr. Karia for Portland Police  
6 Association. Anything that you wish to add right now by way  
7 of status report?

8 MR. KARIA: Thank you, Your Honor. As a  
9 preliminary matter, with respect to your inquiry as to the  
10 status of the current collective bargaining agreement, it  
11 has expired. There's a term in the collective bargaining  
12 agreement that does what is loosely called an evergreen  
13 clause that provides that the collective bargaining  
14 agreement remains in full force and effect during our  
15 negotiations period. So just a little bit of extra  
16 background for your knowledge.

17 THE COURT: All right. And a little bit later  
18 today we'll talk about what effect that might have, in terms  
19 of the Court's ability to consider whether or not to approve  
20 a settlement agreement that may conflict with an expired  
21 collective bargaining agreement; albeit, one with an  
22 evergreen clause. We'll talk about that a little later  
23 today.

24 MR. KARIA: Sure.

25 THE COURT: Let me turn to Ms. Albies or

1 Ms. Curphey. Am I pronouncing that right?

2 MS. CURPHEY: Curphey.

3 THE COURT: Curphey? Thank you.

4 Any additional status that the AMA would like to  
5 report? And, by the way, congratulations to you on what  
6 sounds like a successful settlement agreement or mediated  
7 result.

8 MS. ALBIES: Thank you, Your Honor. We don't have  
9 much to add. We appreciate the efforts of the City and the  
10 DOJ. And on behalf of our clients and the community to work  
11 with us and to continue to hear our concerns, and we will  
12 continue to advocate for strong oversight and  
13 accountability. Thank you.

14 THE COURT: Thank you, Ms. Albies.

15 All right. Here's my thinking on what we should be  
16 talking about and where we need to go with respect to what's  
17 left in this case: I'll start with the comment that I've  
18 made both in my opinion and order that I issued on  
19 February 19th of this year and that we've talked about in  
20 various conferences, and this is my understanding of the law  
21 that I must follow from the Ninth Circuit, and, frankly,  
22 they're relying upon Supreme Court precedent.

23 And that's the comment that appears in the case of  
24 *United States v. City of Los Angeles*, Ninth Circuit, 2002,  
25 at 288 F.3d 391, and the quote appears on page 400. And you



1 know it, but I'll put it on the record again.

2 The Ninth Circuit has unambiguously held that, quote,  
3 Except as part of court-ordered relief after a judicial  
4 determination of liability, an employer cannot unilaterally  
5 change a collective bargaining agreement as a means of  
6 settling a dispute over whether the employer has engaged in  
7 constitutional violations, closed quote. And that's the  
8 Ninth Circuit citing, among other things, the *Local Number*  
9 *93 International Association of Firefighters v. City of*  
10 *Cleveland* decision from the United States Supreme Court in  
11 1986.

12 So what that tells me is that I look at the proposed  
13 settlement agreement. I look at the collective bargaining  
14 agreement, and I've read what the parties have said about  
15 it. And it does appear that the Portland Police Association  
16 argues that there are a number of propositions in the  
17 proposed settlement agreement that modify rights of the  
18 Portland Police Association or its members under the  
19 collective bargaining agreement.

20 Now, footnote here. The collective bargaining  
21 agreement that just expired on June 30th, 2013, but appears  
22 to at least continue to enforce subject to its evergreen  
23 clause in the footnote.

24 So I know there appears to be a disagreement between  
25 the Portland Police Association and at least the United

1 States in terms of how many provisions are in conflict, but  
2 even from the United States's briefing, I see that the  
3 United States admits that there are what the United States  
4 calls a small number of provisions that are in conflict  
5 between the proposed settlement agreement that has been  
6 presented to me and the collective bargaining agreement that  
7 recently expired. I don't think I necessarily need to  
8 resolve which agreement -- which provisions really are in  
9 conflict as long as right now I recognize parties do seem to  
10 agree that there are at least some that are in conflict.

11 Would that -- by the way, I'm just telling you my  
12 thinking right now. If anyone thinks I'm analyzing this  
13 incorrectly, you will have an opportunity to explain to me  
14 your thinking, and I encourage you to do so.

15 Here's my thinking on it: As long as there are some  
16 provisions that are in conflict between the proposed  
17 settlement agreement and the collective bargaining  
18 agreement, putting aside this question of what are the legal  
19 implications to the fact that the collective bargaining  
20 agreement seems to have been -- seems to have expired,  
21 putting it aside, as long as there are some provisions, I  
22 think the U.S. Supreme Court case law and the Ninth Circuit  
23 case law is pretty clear that I simply cannot give approval  
24 even if I otherwise thought that the proposed settlement  
25 agreement was fair, reasonable, and appropriate. And I have

1 not made that decision yet. That would have to await a  
2 fairness hearing. But even if I were to reach that  
3 conclusion after a fairness hearing, I simply can't approve  
4 a settlement agreement that conflicts with rights under a  
5 collective bargaining agreement in that context.

6 The Ninth Circuit and the Supreme Court say the only  
7 way I could do that -- namely, the "that" being affect  
8 rights under a collective bargaining agreement -- is if I  
9 were to first make a judicial determination of liability.  
10 Namely, on the complaint that the United States presented, I  
11 would need to find a determination that, yes, the plaintiff  
12 is right on questions of liability; that the defendant  
13 and/or the defendant interveners are liable; that there have  
14 been a pattern and practice of constitutional violations  
15 such that the Court's equitable power, injunctive power, is  
16 appropriate.

17 And then I could proceed to determine what would be an  
18 effective and appropriate and lawful remedy and there, if I  
19 felt that the facts and circumstances warranted it, I could  
20 enter appropriate relief even if that relief were  
21 inconsistent with or violated or abrogated rights under the  
22 collective bargaining agreement between the City and the  
23 Portland Police Association. That's the way I see it.

24 So it looks to me as if the right thing to do next is  
25 to schedule a trial, because at -- right now it seems to

1 me -- again, this is where I'm going to be inviting your  
2 feedback and your comments, but it seems to me that the  
3 United States and the City on the one hand and the Portland  
4 Police Association on the other really don't disagree that  
5 there's a portion of the collective bargaining agreement  
6 that is inconsistent with some of the relief requested in  
7 the proposed settlement, and unless either the police  
8 association drops its objections or the Government drops its  
9 request for those provisions, then it seems that we have to,  
10 then, make a judicial determination of whether there is or  
11 is not liability.

12 Now, I'd also note that when I granted the motion to  
13 intervene on behalf of the Portland Police Association, that  
14 was requested by the Portland Police Association, remember I  
15 did so only for purposes of remedy; their participation on  
16 remedy. Well, now it looks to me like I need to address a  
17 motion to intervene on purposes of liability, as well. It  
18 seems to me that they should be allowed to intervene for  
19 purposes of liability. And, again, I'll hear whatever  
20 arguments anyone wishes to make on that question, but it  
21 seems to me that if we're going to be now addressing the  
22 question of liability, since the reason why we're doing that  
23 is because of the alleged conflict with the collective  
24 bargaining agreement rights, it should be allowed to  
25 intervene for purposes of liability.

1 Now, if that's right and if I don't allow them to  
2 intervene for purposes of liability, then the next step  
3 would be a trial date. This, of course, is a bench trial.  
4 The only relief being sought is declaratory relief and  
5 injunctive relief. There's no right to a jury trial here.  
6 By the way, if anyone disagrees, let me know; but I don't  
7 think there is. And so I need to schedule a bench trial.

8 Now, under the Federal Rules of Civil Procedure, I can  
9 bifurcate issues. It's under 42B, and my plan would be to  
10 bifurcate the issues and to hold a bench trial solely on the  
11 question of liability. That's all I would take evidence on.  
12 That's all I would want to consider. We would deal with the  
13 appropriate remedy later if and when liability is found.

14 Again, if someone thinks that that is not the best way  
15 to proceed, you're welcome in a few minutes to tell me that,  
16 but that's the current state of my thinking on it.

17 That can raise the question, at least in my mind, and  
18 I'm not seeing anything from any of the parties that answers  
19 this question, so I'd appreciate your views on it. And  
20 folks primarily in the City, of course, is who's going to  
21 defend that question of liability? I know that the City  
22 wanted to stipulate to the proposed settlement agreement  
23 that was originally filed the first day this case began,  
24 back in, I think, November of 2012.

25 Now, the City has a right, of course, to defend on the

1 liability question, but they don't have to. And so at some  
2 appropriate time, perhaps today -- but, if not today, then  
3 soon -- I would like to know whether the City plans on  
4 defending against the liability allegations asserted by the  
5 United States. If so, then that takes us in one direction;  
6 but, if not, then so be it. They don't have to. There are  
7 a number of civil cases that go to trial where a defendant  
8 concedes liability and then proceeds directly to talk about  
9 an appropriate remedy.

10 If the City decides not to challenge liability, and  
11 maybe even if they do, then the question is will the  
12 Portland Police Association want to be heard on questions of  
13 liability and to defend liability issues and perhaps they  
14 may be the only trial counsel, if you will, at that trial on  
15 liability, or perhaps they'll do it in conjunction with the  
16 City. That remains to be seen.

17 But it seems to me that we need to, then, reach  
18 conclusion on whether there is or is not a determination of  
19 liability before we then proceed to the next phase, which is  
20 an appropriate remedy.

21 And there I would envision, if -- and I -- I'm not  
22 prejudging anything, but if there were a finding of  
23 liability, then I would think that we would combine somehow  
24 the remedy phase of the trial where the parties can each --  
25 including intervener and including amicus -- can each

1 provide their input on the appropriate remedy based upon the  
2 finding of liability, with that portion of a public hearing  
3 or an opportunity to receive public input on an appropriate  
4 remedy that I would otherwise hold if there were a fairness  
5 hearing.

6 I'm not saying that particularly clearly, but here's  
7 what I'm getting at: If we bifurcate the trial into  
8 liability first and then remedy later and if there were a  
9 finding that, yes, there was liability, as part of the trial  
10 on an appropriate remedy, where the parties and the  
11 intervener and the amicus would all have the opportunity to  
12 provide evidence and argument on the appropriate remedy,  
13 which could very well simply be should we adopt the proposed  
14 settlement agreement that the United States offers or should  
15 there be some other remedial provisions, I would also like  
16 to build into that an appropriate opportunity for public  
17 comment on an appropriate remedy.

18 But that's down the road. We can deal with the  
19 specifics and the logistics of that later, after we make the  
20 determination of whether or not there is or is not  
21 liability.

22 At least that's how I view it. And so it looks to me  
23 like the next thing we should do, unless I'm missing  
24 something, would be to grant the Portland Police  
25 Association's motion for intervention for liability purposes

1 now, as well, unless someone wants to either defer doing  
2 that or someone wants an opportunity to brief that issue,  
3 but it does seem to me that that's the right way to proceed.  
4 And also to schedule a trial date on the liability portion  
5 only. If someone wants to argue why it shouldn't be  
6 bifurcated, I'll listen to that; but it does seem to me that  
7 the right thing to do is to bifurcate and deal with the  
8 liability and deal with remedy after that, if and when  
9 there's a liability determination.

10 That's how I look at things right now.

11 I'm truly sincere when I say if anyone thinks that I'm  
12 looking at it incorrectly, please speak up. If anyone has  
13 any better ideas of how to proceed, please speak up. Anyone  
14 who wishes to speak first, can do that. But, in the absence  
15 of seeing anybody raising hands and wanting to speak now, I  
16 think I'll just go to my general order. I'll call first on  
17 the United States and then on the City and then on the  
18 intervener police association and then on amicus, unless  
19 somebody wants to raise a hand right now and speak first.

20 MR. GEISLER: Your Honor, this is Jonas Geissler  
21 from the Civil Rights Division of DOJ in D.C. Your Honor,  
22 we would submit that for the issue of whether or not the PPA  
23 should be granted intervention on liability, parties should  
24 be permitted to brief that issue. And, in fact, we do not  
25 believe, as an initial matter, the PPA should have the



1 ability to intervene on the liability issue.

2 THE COURT: Thank you, Mr. Geissler.

3 Can you give me a general understanding of what sort of  
4 argument you anticipate presenting on that question?

5 MR. GEISLER: I think I would do a disservice to  
6 my client to try to foreclose what arguments we may develop  
7 in light of Your Honor's opinion today. However,  
8 from -- from our standing right now, it appears that the PPA  
9 would not have the standing to assert that they could not  
10 consent to or be found liable on its own. There is no  
11 liability to the PPA members individually under the  
12 injunctive relief that we seek.

13 THE COURT: All right. Thank you. Anything else  
14 from anyone with the United States?

15 I see Ms. Brown standing.

16 MS. BROWN: Yes, Your Honor. Thank you. Along  
17 with the liability issue, and as Jonas mentioned, that we  
18 don't seek any individual, you know, relief  
19 against -- relief against individual members, but we do  
20 believe, even before we get to that point -- I mean, we  
21 agree with most of everything that you just -- just laid  
22 out, as far as the process goes, with the exception to, you  
23 know, what we talked about in our brief about conflicts with  
24 collective bargaining agreements and sort of where we go  
25 next.

1 I mean, we -- the United States does believe there are  
2 a small amount of issues that may be subject to bargaining,  
3 and that is something that, you know, we had previously  
4 asked the Court, before we went into mediation, if we could,  
5 you know, narrow the issues that may be subject to  
6 collective bargaining, and the Court, understandably, said,  
7 "Let's see if the parties can figure that out." And at this  
8 point in time we were unable to get an agreement on that.

9 But we do believe that there are -- there are issues  
10 that would be subject to collective bargaining, but not  
11 necessarily in conflict with the agreement. So we do  
12 believe that these issues -- there are many issues that  
13 could be, you know, achieved through some sort of collective  
14 bargaining, and we preserved that right in the -- you know,  
15 in the settlement -- the proposed settlement agreement we  
16 provided to the Court that this doesn't, you know, diminish  
17 the ability for the City to collectively bargain issues that  
18 are necessary to do so.

19 The other aspect of it is -- is the preliminary  
20 questions that the Court thought needed to be resolved back  
21 in its order on February 19th, and there were two  
22 preliminary questions. And I understand that, you know, the  
23 Court at this point in time believes that there -- there may  
24 be issues that do conflict, but we would ask that we be  
25 provided an opportunity to brief those issues to the Court

1 prior to -- you know, I understand the Court would like to  
2 set a trial date, and it's not that we have a problem with  
3 that -- it's certainly a way to move a case forward, is to  
4 set some dates and get the parties working towards those  
5 dates -- but we would like the opportunity to be able to  
6 brief the Court a little bit more about what, in fact,  
7 the -- are the issues as to whether or not the settlement  
8 agreement prejudices the legal rights of the PPA and of the  
9 labor agreement.

10 And, you know, we do believe there is some concern  
11 about use of judicial resources. And even with the  
12 evergreen clause, that if there is to be a new collective  
13 bargaining agreement, that the Court would want to view the  
14 scope in the -- in -- any prejudices that may exist under a  
15 new collective bargaining agreement; not to say that we  
16 should wait for that -- you know, forever, for that to  
17 happen, but it very well may be that that -- that issues may  
18 be able to be resolved, and, therefore, we would like the  
19 opportunity to, I guess, provide the Court briefing on that  
20 at a later -- at a later time, to allow those issues to go  
21 forward.

22 As I said, we agree -- I think the bifurcation of a  
23 trial makes sense, and I think the City does have some  
24 issues to consider about whether or not they want to, you  
25 know, concede to liability and whether or not PPA wants to

1 be heard, but on those issues, as Mr. Geissler said, we  
2 would like an opportunity to brief the liability issues.

3 THE COURT: Okay. Thank you.

4 And what I heard Mr. Geissler also talk about is that  
5 the Government wants an opportunity to brief the question of  
6 intervention on liability, too.

7 MS. BROWN: Yes. That's what I mean. Thank you,  
8 Your Honor.

9 THE COURT: Ms. Brown, I appreciate your comments.  
10 I know this is probably what you would want to put into a  
11 brief with more thought and more collaboration, but let me  
12 ask you this now, anyway, based on what you said. When you  
13 talk about the fact that, yes, there are some number of  
14 issues that may be in the proposed settlement that are  
15 subject to bargaining, but when you say that they don't  
16 necessarily conflict with the agreement, help me understand,  
17 because here's what I'm seeing: I'm seeing the proposed  
18 settlement agreement says that if certain issues need to be  
19 subject to collective bargaining, then collective  
20 bargaining, with appropriate notices, will take place. And  
21 if the United States doesn't like the result of that or if  
22 the collective bargaining process doesn't work and there  
23 isn't an agreement reached, then the United States will  
24 reserve the rights, if under the present settlement  
25 agreement, if it were adopted, to come in and ask the Court

1 to order that the parties follow the settlement agreement.

2 So what that looks to me as, and this is where I'm  
3 having problems with the *City of Los Angeles* decision from  
4 the Ninth Circuit, it looks to me as if, well, there's a  
5 possibility here that if there's a matter that's subject to  
6 bargaining that doesn't result in everyone being satisfied,  
7 including the plaintiff, the plaintiff can come in and have  
8 me order the City to do something in a certain way,  
9 notwithstanding the fact that it was not -- it was not  
10 successfully bargained to the agreement between the City and  
11 the Portland Police Association, and that may very well be  
12 the right remedy that a court reaches after a judicial  
13 finding of liability. But absent that judicial finding of  
14 liability, how could we possibly have that legal result  
15 simply as a settlement agreement?

16 MS. BROWN: We -- again, with the desire to have  
17 some further collaboration, I don't disagree with you on  
18 that. I do believe that there is a possibility for the  
19 issues -- any conflicts to be resolved through collective  
20 bargaining, and I believe it's in paragraph 189 of the  
21 proposed settlement agreement where we ask -- or the City  
22 agrees that they will notify us if any term of the agreement  
23 becomes subject to collective bargaining they'll keep us  
24 apprised of that status. If, indeed, there's a conflict  
25 that can't come to resolution, that's the only way the Court

1 could order it, would be through a finding of liability.

2 MR. GEISLER: Your Honor, this is Jonas Geissler  
3 again from the Civil Rights Division. I would add that in  
4 the scenario that you have placed before Ms. Brown, the  
5 Court would be asked to apply upon whether or not a future  
6 remedy would impair the PPA. At this point in time that  
7 issue is not yet ripe. The settlement agreement, as  
8 written, should not impair any rights of the union. And  
9 only if in the future the union refused or the City and the  
10 union failed to arbitrate successfully in the outcome that  
11 met the settlement agreement, only then would be asked to  
12 implement.

13 THE COURT: Now, Mr. Geissler, let me make sure I  
14 understand what you're saying. Take me through what would  
15 happen in that future hypothetical. So assume we have a  
16 settlement agreement that's been approved, an unsuccessful  
17 bargaining about some future issue, the United States then  
18 wants me to enforce some substantive aspect of the  
19 settlement agreement that could only be done if there were a  
20 finding or determination of liability on the original  
21 complaint. How do we go about doing that in the context of  
22 simply an enforcement proceeding of a settlement agreement?

23 MR. GEISLER: I -- at some future point we may  
24 have to show liability, but at this point there's no legally  
25 protected interest that is impaired that is a -- a -- a

1 necessary step of intervention in the liability phase.

2 THE COURT: Now, I know you asked for an  
3 opportunity to brief, and maybe the answer to my next  
4 question will be that's what we would like to put in the  
5 briefing, but do you have any case law that shows that what  
6 you have just described is a lawful and workable solution in  
7 this context? Because it does look to me that it may very  
8 well be in conflict with the Ninth Circuit's position in  
9 *City of Los Angeles*. On the other hand, it's also possible  
10 that what we're talking about now is not necessarily  
11 envisioned by the Ninth Circuit in *City of Los Angeles* and  
12 therefore might be not covered by that opinion, in which  
13 case my question is if there's any precedent that you're  
14 aware of that supports the scenario that you're describing.

15 MR. GEISLER: Your Honor, I believe you're right.  
16 The *City of Los Angeles* case did not address that specific  
17 issue. However, I'll agree with the Court's belief that  
18 this is most appropriately addressed through briefing and at  
19 a more extensive legal research on this particular issue and  
20 probably on analogous cases, as there are very few cases  
21 under 14141.

22 THE COURT: Okay. I understand what you're  
23 saying.

24 All right. Anything else from the Government at this  
25 time on these issues?

1 MS. BROWN: No, Your Honor. Thank you.

2 THE COURT: Does the City wish to be heard on  
3 these issues?

4 MS. OSOINACH: Yes. Thank you, Your Honor. I  
5 guess just to clarify at the outset, I want to make it clear  
6 that the City's position is that the settlement agreement  
7 does not impair the collective bargaining rights and is not  
8 in conflict with the PPA's collective and the City's  
9 collective bargaining agreement.

10 What we did concede was that for the purposes of the  
11 liberal intervention rules, under Rule 24 and the Ninth  
12 Circuit's interpretation of that, that the PPA need merely  
13 show that there was a hypothetical possibility that a  
14 conflict could exist. And for those reasons we conceded  
15 that we thought that the PPA should be entitled to intervene  
16 on the remedy portion, but we did not agree that the  
17 settlement agreement and the CBA are in conflict.

18 As a second point, even if the Court were to find that  
19 we had, in fact, by conceding the hypothetical possibility,  
20 had conceded that there was a conflict between the CBA and  
21 settlement agreement, I -- following the Court's lead in  
22 pointing out of course that the old CBA is -- has expired  
23 and despite the fact that it remains in full force and  
24 agreement, it seems to me that the Court's role is to look  
25 at the collective bargaining agreement, compare it with the



1 settlement agreement, and, since we know with certainty that  
2 the new collective bargaining agreement will not be -- have  
3 the same terms as the old collective bargaining agreement,  
4 it seems to me that it -- there is some value in waiting for  
5 the current collective bargaining process to play out so  
6 that the Court can see what the new collective bargaining  
7 agreement looks like.

8       And I think that's particularly appropriate in this  
9 case, because the hypothetical nature of the conflict that  
10 might appear before the Court I think very well could be  
11 resolved in the collective bargaining process, because I  
12 think it's very difficult to come up with scenarios where  
13 something that would happen in the collective bargaining  
14 process or something that would happen as a result of  
15 arbitration would actually be a conflict that would be  
16 presented to this Court and that this Court would be asked  
17 to somehow override the results of the collective bargaining  
18 process or what would happen in an interest arbitration or  
19 what would happen as the result of a grievance.

20       And because of the speculative nature of it, it seems  
21 to me that there's value in waiting 30 days, 90 days, for  
22 the collective bargaining process to play out to see whether  
23 or not the new collective bargaining agreement addresses the  
24 speculative possibility that there could be a conflict.

25       So the City's position would be that we feel that it

1 would be helpful to have a date further out for us to check  
2 back in with the Court and apprise you of the status of  
3 those collective bargaining negotiations.

4 THE COURT: Thank you, Ms. Osoinach, let me ask  
5 you this: Without going into positions, offers, or  
6 counteroffers, can you just give me the sense of the  
7 logistics and the general time table for how the City and  
8 the Portland Police Association go about entering into a new  
9 collective bargaining agreement? Just, logistically and  
10 temporally, how would that work?

11 MS. OSOINACH: Sure. Logistically, the City and  
12 the PPA have a series of meetings that are -- have been and  
13 will be set over the course of the next several months to  
14 meet and exchange proposals. At some point if the parties  
15 declare that they are at impasse, the next step in the  
16 procedure is for the parties to present their respective  
17 proposals to an interest arbitrator who would then decide  
18 which of the proposals was ultimately going to become the  
19 collective bargaining agreement.

20 So at this point in the process I think probably the  
21 best estimate that I could give you is that if the  
22 negotiations had to proceed all the way to an interest  
23 arbitration, where the arbitrator were to choose a proposal,  
24 that that would be about six months from today when that  
25 process would completely play out. Of course in between now

1 and six months there are lots of opportunities for the  
2 parties to come to agreement, but I would say that's, you  
3 know, a -- a worst case or just a -- the lengthiest amount  
4 of time scenario.

5 THE COURT: One more question for you right now,  
6 too, and if you want to answer this question by saying,  
7 "It's too soon to tell," I'll accept that answer; but if you  
8 can give me more information, I'll accept that, too. And  
9 that is question: If I were to conclude that we need to  
10 have a judicial determination on whether there is or is not  
11 liability before we can deal with the issue of remedy, and  
12 assuming -- you know, putting aside whether I do or do not  
13 grant Portland Police Association intervener status for  
14 liability purposes -- put that aside -- does the City know  
15 now whether or not it would contest liability in whole or in  
16 part or not at all?

17 MS. OSOINACH: I think predictably my answer is  
18 it's too soon to tell. I can tell you we certainly thought  
19 about exactly the scenario that you've just laid out; that  
20 the Court might set a trial date. So it is not that we're  
21 uninformed. It's just I think it's too soon for us to tell.  
22 And, particularly, given the fact that the PPA has asked to  
23 intervene on the merits, as you point out, that adds an  
24 additional layer of consideration for the City.

25 And so I think the -- if the Court wishes to consider

1 the motion to intervene on the merits on the PPA's behalf, I  
2 think probably that that, too, is -- is not ripe for  
3 consideration, at least as of today, because, obviously, the  
4 Court's analysis is going to be impacted by the City's  
5 answer to your question about how we intend to defend or not  
6 on the issue of liability.

7 THE COURT: Okay. Thank you. By the way, that  
8 answer does remind me there was a story I read somewhere  
9 about the first meeting between President Nixon and  
10 Chairman Mao from China when the President went for his  
11 first visit to China. They wanted to find some area of  
12 discussion where they could break the ice; they could talk  
13 about things that were not particularly controversial. And  
14 I think both advisors told both President Nixon and  
15 Chairman Mao that both were interested in world history,  
16 and, as I recall reading the story, President Nixon, early  
17 on in the conversation, asked Chairman Mao whether he  
18 thought the French Revolution of 1789 was good or bad for  
19 the world, and Chairman Mao's response was, "It's too soon  
20 to tell."

21 All right. Any comments right now on any of these  
22 issues or other issues that you wanted to comment on on  
23 behalf of Portland Police Association, Mr. Karia?

24 MR. KARIA: Thank you, Your Honor. At the outset,  
25 we are agreeable to the process as you've laid out, in terms

1 of bifurcation of the trial and whatnot. In terms of the  
2 issues raised by both Ms. Brown on behalf of the United  
3 States and Ms. Osoinach on behalf of the City, I just wanted  
4 to touch on some of those. With respect to the notion of  
5 let's just wait and see what happens in bargaining, the  
6 difficulty with that is mainly the City is taking the  
7 position that a number of, if not all of the issues related  
8 to the proposed settlement agreement, are not subject to  
9 collective bargaining, which raises the notion of if there's  
10 nothing for collective bargaining in the proposed settlement  
11 agreement why would we be waiting for the collective  
12 bargaining process to be exhausted? In other words, the  
13 City would not be amenable for discussing, for instance, a  
14 discipline guide at the bargaining table if it's taking the  
15 position that a discipline guide is not something that it's  
16 obligated to bargain over.

17 As to the issues of ripeness, whether these issues as  
18 to liability and remedy are ripe, they are ripe, and I would  
19 ask to address them individually. As to liability, we did  
20 brief these issues as to whether the PPA could intervene as  
21 to the liability or merits phase in our briefing to you,  
22 which resulted in your order.

23 And in that briefing we pointed to the same Ninth  
24 Circuit case from the City of Los Angeles that we all seem  
25 to be focusing in on. And the standard enumerated there was

1 simply if the complaint raises an issue or request for  
2 injunctive relief and in addition raises the notion that  
3 there are unconstitutional acts by the officers who were  
4 both employed by the City of Los Angeles and also union  
5 members, that tips the boxes, if you will, for intervention  
6 as to the merits.

7 So, in other words, I think we briefed this for the  
8 Court, and I think we have the information before you, which  
9 has prompted you to get to where you're at so far. I don't  
10 see much providence in regurgitating something to the Court  
11 that it has before it.

12 As to the ripeness of these issues, we -- there seems  
13 to be an identification of we're talking of speculation and  
14 what ifs, and we respectfully disagree as to that notion.

15 What we have before us is a proposed settlement  
16 agreement, which, for instance, requires the City to  
17 implement a discipline guide. The discipline guide -- the  
18 notion of discipline as a general subject matter is  
19 mandatory for bargaining under Oregon state law. The  
20 settlement agreement, if entered, would require the City to  
21 agree to a discipline guide.

22 If we play out the hypothetical, if the discipline  
23 guide was something the City and the PPA were to agree to  
24 take to the collective bargaining process and the PPA takes  
25 the position that we do not wish to have a discipline guide

1 and the City takes the position that we do wish to have a  
2 discipline guide and we end up at an impasse, either the  
3 parties do not end up with a discipline guide, whether as  
4 ordered by an interest arbitrator, which is in conflict with  
5 the proposed settlement agreement, and we get right back to  
6 the notion that you identified, Your Honor, which is I am  
7 now left with a piece of paper that is at odds with the  
8 proposed settlement agreement and how can I now order  
9 the -- the Portland Police Association to abide by the  
10 proposed settlement agreement which says discipline guide,  
11 whereas the parties have not agreed to a discipline guide  
12 through the collective bargaining process without a finding  
13 of judicial liability. That issue is ripe. It is before  
14 us. And it is ripe notwithstanding the notion that the  
15 contract is expired.

16 The import of the evergreen clause is very important.  
17 Article 3, within the Portland Police Association's contract  
18 with the City. It's called a maintenance and benefits  
19 clause. And what the maintenance and benefits clause states  
20 is that all conditions of employment that are mandatory for  
21 bargaining must be maintained at no less than the current  
22 level, unless the parties agree, through collective  
23 bargaining, to modify those issues.

24 So, for instance, a discipline guide, which the PPA  
25 asserts is mandatory for bargaining, could not be agreed

1 upon or -- could not be implemented unilaterally by the City  
2 unless the City wishes to violate Article 3 of the contract.

3 Article 3 of the contract survives the expiration of  
4 the contract under the evergreen clause. And so what we're  
5 left with is, according to the association, an obligation on  
6 the City and PPA's part not to upset the apple cart as it  
7 relates to current collective bargaining matters, until they  
8 agree, through collective bargaining, to modify the  
9 agreement.

10 So if the City is now saying, through its proposed  
11 settlement agreement, that it shall and will agree to enter  
12 into a discipline guide without first getting the  
13 association's agreement on that issue, it's essentially  
14 presenting the association with a fait accompli. The City  
15 must have its discipline guide in order to comply with the  
16 proposed settlement agreement. Of course now we're left  
17 with a situation at the PPA, through the collective  
18 bargaining process, that says, no, can this Court then tell  
19 the Portland Police Association you shall have a discipline  
20 guide without a finding of judicial liability? That issue  
21 is ripe before us, and we think the answer is clearly no  
22 under the Ninth Circuit's precedent.

23 THE COURT: Let's follow that through.

24 Now, am I correct in concluding, if I were to agree  
25 with you on that point, that if there were to be a trial and



1 if there were to be a finding of -- a judicial finding of  
2 liability, then the Court has the legal authority, as part  
3 of its remedy, as part of its equitable or injunctive relief  
4 in the remedy stage, to order the City of Portland to have a  
5 disability guide, perhaps with the sort recommended by the  
6 United States, and that's what the Court orders,  
7 notwithstanding anything that may otherwise be in conflict  
8 between that order and the collective bargaining agreement?  
9 Am I correct?

10 MR. KARIA: Yes, Your Honor. Based on what the  
11 Ninth Circuit has told us, it's upon your finding of  
12 liability. If, yes, the City is liable for the issues  
13 raised by the United States in the complaint and if, yes,  
14 you find liability, you would then ask yourself, at the  
15 remedy phase, is this a reasonable and appropriate remedy, a  
16 discipline guide in this particular instance? And if you  
17 determine, yes, a discipline guide is reasonable and  
18 appropriate, according to the Ninth Circuit, it is, yes, you  
19 can tell the Portland Police Association that it shall have  
20 a discipline guide.

21 THE COURT: And if I heard you correctly -- tell  
22 me if I didn't, but if I heard you correctly, you and your  
23 client do not disagree with my approach of bifurcating  
24 liability from remedy phases; correct?

25 MR. KARIA: That's fine with us. Yes, Your Honor.

1           THE COURT: So am I hearing you say that you would  
2 urge the Court both to allow PPA to have intervener status  
3 for liability purposes and then proceed to the trial phase?

4           MR. KARIA: Yes.

5           THE COURT: Okay. When would you recommend that  
6 that trial be held?

7           MR. KARIA: In due course. Given the breadth of  
8 the complaint, I would ask for at least 90 to 120 days to  
9 allow us some minimal discovery so that we have an  
10 opportunity to identify the particular instances of  
11 unconstitutional conduct that the United States have alleged  
12 in their complaint. You know, given the pleading  
13 requirements before this Court, we don't have a  
14 particularized notion of exactly which cases it believes  
15 constitute unconstitutional uses of excessive force.

16          Once we identify those, through some very quick --  
17 hopefully, quick and easy discovery process, that we would  
18 set a trial date 90 to 120 days from that.

19          THE COURT: Again, I'll give you the opportunity,  
20 as I give everybody, you're welcome to say, "It's too soon  
21 to tell," or, "I'd rather not answer this question now," but  
22 my question is this: If we were to move forward towards a  
23 trial date on liability and if it were to turn out that the  
24 City of Portland chooses not to defend on the questions of  
25 liability, is the Portland Police Association, if granted

1 intervener status for liability purposes, prepared to defend  
2 the case on liability questions?

3 MR. KARIA: Yes.

4 THE COURT: Okay. Thank you. Anything further  
5 you wish to add at this time, Mr. Karia?

6 MR. KARIA: No, thank you, Your Honor.

7 THE COURT: Views from the amicus, Albina  
8 Ministries Association, either Ms. Albies or Ms. Curphey?

9 MS. ALBIES: Thank you, Your Honor. In terms of  
10 the Court's position on bifurcation, that's not something  
11 that the AMA Coalition -- that sounds reasonable. We  
12 would -- if you want to express the AMA Coalition's concerns  
13 about further delay on the implementation of the settlement  
14 agreement while the AMA Coalition has serious concerns that  
15 remain as briefed when we filed our motion to intervene  
16 about whether or not the settlement agreement goes as far as  
17 it needs to go and those considerations and concerns remain  
18 today, we're concerned about further delay and  
19 implementation of the portions that might not address or  
20 impact collective bargaining agreement.

21 In terms of moving forward, the AMA Coalition -- we  
22 understand that we have an amicus status with regard to  
23 the -- excuse me, with regard to the remedy phase, but we  
24 would also request to take part in the same type of way in  
25 the liability phase, specifically to address and weigh in on

1 whether collective bargaining of this -- whether this issue  
2 is addressed, whether collective bargaining is impacted, and  
3 how. I think there's a lot of public policy consideration  
4 involved in that. And while the DOJ is certainly confident  
5 and capable of addressing a lot of those issues, I think,  
6 for the reasons we were granted amicus status, the community  
7 perspective on those issues is also very important. So we  
8 would like to take part of the liability phase, as well.

9 And, you know, how that looks, we would leave it to the  
10 Court, but we do think it's important to be present for that  
11 and to weigh in on that.

12 I think that's kind of the gist of what I wanted to say  
13 with the AMA Coalition, but I'm happy to entertain any  
14 further questions.

15 THE COURT: I want to follow up a little bit on  
16 your first point. And with respect to your second point I  
17 am inclined to agree that the AMA Coalition should continue  
18 to have its enhanced amicus status with respect to liability  
19 issues. I do value the input from all the parties,  
20 including the AMA Coalition.

21 You're not asking -- you're not reviewing a request for  
22 intervenor status, and, if you were, I would be disfavored  
23 to grant it anyway, but I'm inclined to allow the AMA to  
24 have the enhanced amicus status to continue for the  
25 liability phase. I'll give the parties an opportunity, if

1 they want, to file any written objections to that before  
2 making a final decision, but I'm inclined to agree with you  
3 on that.

4 But with respect to your former point about the  
5 concerns about the amount of time it's taking before we  
6 actually get to a remedy that the -- to the problems that  
7 plaintiffs alleged and I think that the AMA is concerned  
8 about as well, what does that tell us for all practical  
9 purposes? I do really think the right decision is to  
10 bifurcate between liability and remedy. That doesn't  
11 necessarily mean we have to have months or more between  
12 those two phases. We can go from a liability phase to  
13 a -- immediately to a -- a remedy phase, you know, within a  
14 matter of days or a week or two or three, if we need to.

15 I just think in terms of hearing the evidence it seems  
16 to me that it makes more sense to bifurcate.

17 Do you disagree with that, or do you think the evidence  
18 really is in common?

19 MS. ALBIES: I don't disagree that it makes sense  
20 to bifurcate it. I'm wondering if it would be helpful for  
21 the Court to weigh in on what matters are subject to  
22 mandatory bargaining, required by the bargaining, because  
23 there may be agreement that areas are not -- and those areas  
24 in the settlement agreement can go forward without  
25 grievances being filed and that sort of thing. So part of

1 me -- you know there's a part that wonders if briefing on  
2 the collective bargaining aspect would be helpful to the  
3 parties, including the City and the PPA, and going forward  
4 on collective bargaining, as well.

5 THE COURT: To what extent -- really this question  
6 is addressed to all four sides. Obviously, a federal court,  
7 under Article 3 of the Constitution, can't give advisory  
8 opinions. So to what extent would the Court's view on what  
9 areas of the proposed settlement agreement would or would  
10 not be subject to collective bargaining, to what extent  
11 would that be an impermissible advisory opinion versus to  
12 what extent would that be a non-advisory and perfectly  
13 permissible decision as part of the Court's decision-making  
14 process here to either approve or disapprove a settlement or  
15 to make appropriate liability and remedy determinations with  
16 respect to the complaint?

17 Anyone want to be heard on that?

18 MS. ALBIES: I'll defer to the Department of  
19 Justice.

20 MS. BROWN: Your Honor, again, we certainly would  
21 want to have a little time to confer with the colleagues  
22 that are on the phone, but I do believe that it could -- it  
23 could help determine the two issues that the Court  
24 identified in the February 19th order that the question is  
25 whether or not the proposed settlement agreement, in fact,

1 prejudices the legal rights of the PPA under the labor  
2 agreement, and if it does prejudice legal rights, then to  
3 determine whether that conclusion necessarily precludes the  
4 authority of the Court to approve the proposed settlement  
5 agreement.

6       So I do think it could -- those are the types of issues  
7 we could address in that briefing, and so that -- that -- as  
8 far as allowing the Court to decide that there are -- if not  
9 the entire settlement agreement, portions of the settlement  
10 agreement, that -- that the Court can go ahead and approve  
11 and -- and allow us to move forward on, could be -- could be  
12 helpful in -- in condensing the issues that are left between  
13 the PPA and the City.

14               THE COURT: Anyone else wish to be heard on that  
15 issue?

16               MS. OSOINACH: Yes. Thank you. The City. We  
17 agree that -- I think that would be helpful to brief the  
18 first question that you asked in your initial opinion that  
19 Ms. Brown just cited. I think that would be helpful both to  
20 the parties in this proceeding as well as in the collective  
21 bargaining process.

22               THE COURT: Anyone else?

23               MR. KARIA: Thank you, Your Honor. I -- the  
24 struggle that I think I'm having with this sort of an  
25 analysis is that it takes us away from -- to use some loose

1 terminology -- kind of an all-or-nothing approach, which the  
2 Ninth Circuit seems to implicitly be using in terms of when  
3 it's approving a settlement agreement or consent decree of  
4 looking at the agreement in toto.

5 Now we're possibly looking at severing out pieces of  
6 the settlement agreement. I'm not quite sure if that's the  
7 direction the Ninth Circuit has given us or whether that's  
8 actually a feasible direction. All eyes seem to be on the  
9 collective bargaining implications here as it relates to the  
10 remedy.

11 There is still the issue, obviously, of the PPA's right  
12 to intervene as to the liability phase, which the Ninth  
13 Circuit set as a pretty low threshold and it explained -- in  
14 our briefing to you, which has led us so far to this point,  
15 explained that, yes, that per the Ninth Circuit it seems  
16 that that low threshold is met.

17 And once we get to the liability phase or the merits  
18 phase, there's no issue of whether -- are there collective  
19 bargaining implications or not as to liability. As to the  
20 remedy, sure, if I can see the Court's interest in whether  
21 collective bargaining rights may be impaired. The question  
22 of will they be impaired or may they be impaired, what we  
23 also struggled with is is that the necessary step to take if  
24 the Ninth Circuit has told us that in order to gain party  
25 status in the -- in the affair, all the association must



1 show, as to remedy, is that the rights may be impaired. But  
2 if they've also been granted standing as to a party status  
3 as to the liability, should we be, then, having both a -- a  
4 discussion about liability and a discussion about remedy  
5 simultaneously, when, without liability, we definitely  
6 shouldn't necessarily be jumping directly to remedy quite  
7 yet.

8 THE COURT: I'm not sure I agree that -- at least  
9 on the 14141 -- the section 14141 context, the Ninth Circuit  
10 has said it's an all-or-nothing approach. Frankly, even on  
11 traditional class action settlements that's a little bit  
12 ambiguous. Is there case precedent I should look at that  
13 you're aware of?

14 MR. KARIA: Not aware of off the top of my head,  
15 but I'm happy to look and provide that to the Court.

16 THE COURT: I really did not think that  
17 that's -- at least that's not my understanding of the  
18 Court's rule, to simply do an up-or-down, all -- as you put  
19 it, all-or-nothing approach. I don't -- that's not the way  
20 I understood it.

21 All right. Anyone else want to --

22 MR. GEISSLER: If I may, Your Honor, from the  
23 Civil Rights Division's perspective, there is no necessity  
24 to do an all-or-nothing approach, but, rather, if an  
25 intervener is permitted to block remedy, the fact that it's

1 impaired, then that intervener would hold hostage the  
2 imposition of remedies necessary for the remediation of  
3 constitutional violations.

4 If the issue here is whether or not the PPA has a  
5 legally protected interest that would be impaired, to  
6 determine what portions of the settlement agreement would  
7 have such an impairment -- we contend none -- it would  
8 likely contend a much broader breadth of provisions that  
9 they have in their initial briefing. And that is -- right  
10 now that if -- it really is a -- is an impediment limitation  
11 to think they have nothing to do with the PPA.

12 THE COURT: And I assume that was you,  
13 Mr. Geissler, speaking; correct?

14 MR. GEISLER: Yes, Your Honor. Thank you.

15 THE COURT: And, frankly, what you've said is  
16 consistent with my understanding from the cases that I've  
17 read on this point. That doesn't mean it's a final ruling  
18 on any of these issues, but that's how I understood it, as  
19 well, because it does say in the cases that I've seen that  
20 the interveners do have a right -- or parties in the  
21 position of what PPA is right now, it does have a right to  
22 be heard to protect its protectable rights but does not have  
23 the right or ability to thwart the implementation of the  
24 entire settlement, provided that there's been an  
25 appropriate -- procedurally appropriate vehicle used that

1 may result in the abrogation of collective bargaining  
2 rights.

3 All right. Here's where we are -- unless anyone wishes  
4 to be heard further on any issues right now -- go ahead,  
5 Ms. Albies.

6 MS. ALBIES: Ms. Albies for the AMA Coalition. I  
7 don't know if I was entirely clear, although I understand  
8 the Court probably assumes that the AMA Coalition would also  
9 like to be heard on whether there's any briefing regarding  
10 the PPA's intervener status in the liability phase.

11 THE COURT: Okay.

12 Here's what I think we should do, and then I'll give  
13 you all sort of one final attempt to try to talk me out of  
14 this if you want. Here's what I see: I see three issues  
15 right now I'm about to talk to you about. Number one,  
16 additional briefing. I'm inclined to grant it. And here's  
17 the way I think it should proceed: At a given date -- and,  
18 by the way, I'll solicit your opinion as to when this  
19 opinion should be, but at the given date for the filing of  
20 opening briefs, I would like any party that wants to file an  
21 opening brief to at least include, quite clearly and  
22 explicitly, the following: Number one, what specific  
23 questions do you want the Court to answer? And that could  
24 be, of course, should the PPA be given intervener status for  
25 liability purposes, as well as the other issues that we've

1 been talking about? Point two, from your client's  
2 perspective, what are your proposed answers to the questions  
3 listed in section one? And then, three, what are your  
4 reasons or legal precedent and arguments that support your  
5 proposed answers to the specific questions?

6 Okay. That's relatively easy.

7 Then for any responsive brief that anybody may file,  
8 that responds to what anybody else has said -- again, I'll  
9 ask your opinion on when the appropriate date for that  
10 should be -- I would like you to address the following:

11 First, are there any additional questions that have not yet  
12 been presented to the Court; two, what are your responses,  
13 or do you agree or disagree with somebody else's proposed  
14 answers? And here if you want to factor in that the Court  
15 shouldn't answer some of the questions, your answer could  
16 either be "We disagree with so and so's proposed answer," or  
17 "We don't think that the Court should address it, because  
18 it's an advisory opinion" or any other reason, or both, in  
19 the alternative. But the second section would be what are  
20 your response to what the first party or the party you're  
21 responding to is proposing in the answers? And then the  
22 third section is give me your -- I don't want -- I want it  
23 clear and very easy for me to find. And the third section  
24 would be any reasons, arguments, legal precedence that  
25 support whatever your responses are.

1 And then I would give folks a very brief time and typed  
2 page limit on any reply briefs. I really don't think I have  
3 to make page limits beyond the 35 pages. I think 35 pages  
4 is enough for the opening two briefs. The rely brief I  
5 would like to see 10 pages or less. Get right to the point.

6 So that's point number one.

7 Point number two: I would like to hear your proposed  
8 schedule for those three rounds of briefing. I would  
9 anticipate to schedule an oral argument to deal with all of  
10 that.

11 And so I would like to hear your proposed schedule on  
12 those four things: The opening brief, the responsive brief,  
13 the reply brief, and the oral argument.

14 And then third and, finally, should I schedule a trial  
15 date now? A trial date on liability issues. And, if so,  
16 when; and, if not, why not?

17 Those are my last questions to you. Before I give you  
18 the answers, I'll give you the opportunity to provide input  
19 on what those answers should be.

20 First, the United States.

21 MS. BROWN: Your Honor, first of all, we  
22 definitely appreciate the opportunity to do additional  
23 briefing and are -- are completely willing to comply with  
24 the Court's laying out of the different types of briefs and  
25 the page limits. As far as the schedule for briefing and

1 for oral argument, we'd like the briefing to begin no  
2 earlier than 90 days from now. And so, again, to give the  
3 parties some time to try to work these issues out and to  
4 save in the interest of judicial economy and our precious  
5 resources, if, indeed, we don't have to brief issues and  
6 things can get worked out, then all the better for  
7 everybody.

8 So that would be our proposed schedule for briefing, is  
9 to start it, pick a date 90 days for the -- the due date for  
10 any additional briefing, and then set the subsequent briefs  
11 according to the Court's typical schedule for responses and  
12 replies.

13 And while, you know, typically, I think -- I think  
14 typically we would like to see the case move forward with  
15 trial dates and discovery and motions, and things like that,  
16 I -- I do believe that it's -- so much is going to ride on  
17 the Court's consideration of these very important issues,  
18 that we wait and set a trial date until after the Court has  
19 heard the briefing.

20 THE COURT: Okay. And, typically, it's the  
21 plaintiff who wants to get to trial sooner rather than  
22 later.

23 MS. BROWN: Yes, Your Honor.

24 THE COURT: Obviously, you're trying to enforce  
25 interests that -- and needs that you believe are very

1 important. I've read through the complaint, so I think it's  
2 significant that the plaintiff is not urging me to have a  
3 trial date sooner rather than later.

4 MS. BROWN: Yes, Your Honor. Thank you.

5 THE COURT: The City?

6 MS. OSOINACH: Thank you, Judge. As to the  
7 briefing schedule, we appreciate you asking these questions  
8 and allowing us the opportunity to brief on them. Like  
9 plaintiff, we think that 90 days, or at least some time in  
10 October, for the first opening brief. By that point I think  
11 we will have additional information that will shed light on  
12 these issues. And, like plaintiff, I think it's premature  
13 to set a trial date, and we would ask that the Court not do  
14 that.

15 MR. KARIA: Thank you, Your Honor. Anil Karia for  
16 the PPA. Respectfully, we think briefing is probably  
17 unnecessary. We would see three potential questions put  
18 forth before you, Your Honor, which is can the PPA -- may  
19 the PPA intervene as to liability? I think the answer -- I  
20 think the briefing has already been provided to you on that  
21 issue, since when the PPA moved to intervene we moved to  
22 intervene both on the liability and remedial phases.

23 So with all due respect to my esteemed counsel, I think  
24 we have everything before you that we already did -- found  
25 necessary to get that answered question.

1           As to the remaining at least obvious questions that the  
2 parties would at least make an attempt to answer for you,  
3 which were the questions you initially posed in your order,  
4 the first question is will the PPA's collective bargaining  
5 rights be impaired with the United States's concession that  
6 there are some collective bargaining agreement rights out  
7 there that will be impaired. I don't think we necessarily  
8 have to find a full and complete briefing schedule just to  
9 answer that question when the plaintiff has already agreed  
10 that there's something out there that -- that could pose  
11 problems for the collective bargaining side or, excuse me,  
12 will pose problems on the collective bargaining side.

13           As to the last question that you had posed within your  
14 briefing, which was can I impose changes to the collective  
15 bargaining agreement without a judicial finding of  
16 liability, I think the Ninth Circuit answered that question.  
17 And although other circuits -- I have not read every single  
18 circuit's take on this particular issue, but the Ninth  
19 Circuit, having spoken, has probably lent us the guidance we  
20 need.

21           As to a trial date, I -- we do respect the need for  
22 judicial efficiency and the scarce resources that the  
23 federal government is now working with, given the  
24 sequestration, and whatnot, and so while we'd be agreeable  
25 to setting the trial date out further to allow us to



1 continue discussions, we would seek to have a trial date set  
2 so that the parties at least have some finish line as to  
3 that issue in sight. Thank you.

4 THE COURT: Thank you.

5 MS. BROWN: Your Honor, if I may just respond  
6 one --

7 THE COURT: You may.

8 MS. BROWN: I just want to make it clear that the  
9 United States has not conceded that this proposed agreement  
10 impairs or conflicts with the collective bargaining. We  
11 believe there may be some issues that are subject to  
12 collective bargaining, but not that it impairs collective  
13 bargaining. So I just wanted to make that point clear.

14 THE COURT: The argument I'm hearing, and I heard  
15 it from Ms. Osoinach, as well, is that the position of the  
16 United States and maybe even the City, as well, is that  
17 there may be provisions in the proposed settlement agreement  
18 that might trigger the need for collective bargaining. And  
19 if collective bargaining results in an agreement that is  
20 satisfactory to the City and to the Portland Police  
21 Association and to which the United States does not object,  
22 well then that problem is solved. To the extent that there  
23 is not collective bargaining, then I think everybody is in  
24 agreement that the Court can't simply enter an order and  
25 forcing as part of the settlement agreement something that

1 would violate collective bargaining rights of the Portland  
2 Police Association or its members, but that there may be  
3 other procedural vehicles, such as holding a limited trial  
4 on liability purposes to see whether or not the Court should  
5 then order, as some extension of the settlement agreement,  
6 some additional remedy.

7 And the only question I think -- that's what I'm  
8 hearing from both the United States and the City. The  
9 question that's in my mind is can I do that as part of a  
10 settlement agreement? Because what we're talking about is  
11 that would be a dispute resolution mechanism that would be  
12 built in to a settlement agreement, as opposed to don't I  
13 have to make some finding of judicial liability on the  
14 original complaint before I can ever do anything that  
15 results in an abrogation of the collective bargaining  
16 agreement. That seems to be how I'm reading the *City of Los*  
17 *Angeles* case, but I could be wrong. There could be other  
18 precedent. I could be misunderstanding something. You  
19 could talk me out of that approach. But that's the  
20 question, the unresolved question, where at least I'm  
21 hearing today is the United States and the City saying not  
22 necessarily, but I'm hearing the Portland Police Association  
23 saying, yes, that is how you have to do it.

24 MS. BROWN: And that, Your Honor, is, I believe,  
25 what the Court hasn't heard, or I disagree with my opposing

1 counsel, Mr. Karia. I don't believe the Court has heard the  
2 briefing on the two important issues it raised in its  
3 February 19th opinion and therefore would desire -- United  
4 States would desire to provide the Court that information on  
5 whether or not it does in fact -- this proposed settlement  
6 agreement does, in fact, prejudice legal rights of the PPA  
7 under the labor agreement.

8 THE COURT: And I'm inclined to agree with the  
9 questions -- the two questions you're referring to of course  
10 are on page 19 of my February 19th opinion, which is docket  
11 32. I'm inclined to agree. We have not had briefing on  
12 that. That's why I said on that page that we need to have  
13 briefing on that if there is no settlement.

14 What I do think I agree with Mr. Karia on, though, is  
15 I've seen a lot of briefing on whether or not the PPA should  
16 or should not be allowed intervener status on liability if  
17 there is no settlement. I deferred ruling on it. I didn't  
18 rule on it. I didn't reject their motion. I deferred  
19 ruling on it, in part, because I figured why do I need to  
20 address that question if there's a possibility of settlement  
21 if there's not going to be a settlement, well, then I need  
22 to address it.

23 Do I think I need more briefing on that question?  
24 Honestly, no. But if someone really wants to address that  
25 as one of their proposed questions and use up part of your

1 page limitations on that answer, fine. You can add a little  
2 bit more to it if you want.

3 MS. BROWN: Okay. Thank you, Your Honor.

4 THE COURT: All right. Where were we? Did I hear  
5 from -- I think I need to hear from AMA on some of these  
6 scheduling issues. Did I already hear that and miss that?

7 MS. ALBIES: No. Thank you, Your Honor. We agree  
8 with the proposed additional briefing and how you framed it,  
9 and we appreciate the Court's framing it for us.

10 Because, as I've already mentioned, the delay that's  
11 already been ongoing in this case, we would urge the Court  
12 to set a briefing schedule in 30 days. First brief is due  
13 in 30 days. You know, we recognize that the DOJ and the  
14 City are in agreement about a longer period, but we do think  
15 that there are areas of the settlement agreement that can  
16 move forward without impacting collective bargaining, and we  
17 think that those should be starting to move forward in a way  
18 that -- if there's a possibility and a way to do that, then  
19 we would like to find that way.

20 And with regard to the trial date, it seems, just for  
21 the purposes of everybody's schedule and determining what  
22 the Court decides on briefing, that we would weigh in on  
23 that at a later date. We will agree with everyone else that  
24 a trial date, while I agree with Mr. Karia, would help kind  
25 of set the end line here, we also want to kind of get things

1 moving, but recognize people's -- the briefing issue is  
2 going to take precedence.

3 THE COURT: I understand the objective that you're  
4 seeking is to try to see if we can get as many problems that  
5 the AMA perceives exists right now solved sooner rather than  
6 later, but I -- and I think that reaching an ultimate  
7 resolution in getting a trial date, assuming there is a  
8 finding of a liability, which I'm not prejudging, but if  
9 there were and we imposed some remedy, hopefully the remedy  
10 would be successful, and that may be a positive factor  
11 towards reaching some improvement.

12 But I don't see how simply accelerating the briefing on  
13 this -- the questions that -- these preliminary questions  
14 that we're now talking about would necessarily play that big  
15 of a role. What am I missing?

16 MS. ALBIES: Well, to the extent the parties brief  
17 and the Court weighs in on what is subject to -- what kind  
18 of prejudicial impact the settlement agreement might have on  
19 collective bargaining and the parties are in the collective  
20 bargaining, it might help frame the issues to help that  
21 process move forward.

22 THE COURT: Ms. Brown, any further thoughts on  
23 that, given that you're the one asking for 90 days, although  
24 the City agrees with you?

25 MS. BROWN: I -- my only -- my only thought is

1 that while I understand what Ms. Albies is saying, that I  
2 would hate for briefing to distract from the efforts of  
3 collective bargaining. And while I'm not involved in  
4 collective bargaining and certainly I can turn my attention  
5 to briefing -- although, I have plenty of other work to do,  
6 you know, that is our -- our overall concern is to give  
7 parties an attempt to do collective bargaining or other  
8 means in an attempt to try to figure this out without  
9 devoting precious resources to briefing.

10 THE COURT: Ms. Osoinach, I assume the City agrees  
11 with that?

12 MS. OSOINACH: Yes. Yes. We -- I think it would  
13 be very helpful in the process to have additional time, so  
14 we agree with the plaintiff.

15 THE COURT: And, Mr. Karia, you --

16 MR. KARIA: Yeah. Thank you, Your Honor. To the  
17 degree that the Court is inclined to set and have briefing,  
18 I do agree with the United States and the City of Portland  
19 that at least 90 days out to allow us the opportunity to  
20 focus some significant attention on the underlying issues  
21 would be a good course of action.

22 THE COURT: Okay. I'm inclined to agree and  
23 accept the 90 days with the following caveat: I'm now going  
24 to add to one of the questions that I would like you all to  
25 answer. You can briefly answer it and a brief reason. When

1 should the trial date be? Please add that to your briefing.

2       Feel free to confer with each other, too, because if  
3 you can all agree on that, it will make things more likely  
4 that you will get what you want. But I would like to --  
5 I'll give you the 90 days on the briefing, I'll give you the  
6 briefing schedule in a few minutes. But once we're done  
7 with those preliminary matters, and I've made those  
8 decisions, I want to move rapidly to trial.

9       So figure out what discovery you're going to need.  
10 Figure out who will and will not be fighting on liability  
11 issues or not. Figure out what discovery you need, both  
12 plaintiff and/or defense directed, in order to be able to  
13 get this case to trial. And I want an early trial date, as  
14 early as we can possibly make it, given all the complex  
15 issues we have to address, because I do want to move this to  
16 conclusion.

17       And my inclination, and I don't hear any disagreement  
18 from anyone, is we should bifurcate and hear liability  
19 issues first at trial. But feel free, also, to tell me if  
20 you think we should move promptly into a trial on remedy  
21 issues or not. What are your proposed schedules? You don't  
22 have to spend too much time or analysis on this, but I would  
23 like to know your thinking and now you know my thinking.  
24 I'm willing to give you the time to work through the issues  
25 we've been describing, discussing, but I do want to make

1 sure that we don't lose sight that the complaint alleges  
2 some very serious issues that are filed, and, in the absence  
3 of a settlement agreement, that will then result in a  
4 fairness hearing, where the community can participate, there  
5 will be a trial on the merits.

6 All right. Here's what we're going to do. 90  
7 days -- today is July 18th. The first round of briefs will  
8 be due on October 21st, 2013. That's 90 days, taking us to  
9 the following Monday. Is that right? So we have -- yeah,  
10 so October 21st.

11 I think it's sufficient to have two weeks for the  
12 response and two weeks for the reply. Anybody want to try  
13 to talk me out of that? Done. All right. Responses due  
14 November 4th, 2013. Replies due November 18th, 2013.

15 Give myself about two weeks to read -- make sure I've  
16 read everything.

17 How are you on oral argument -- I have a trial that  
18 week. One moment. How are you for oral argument on  
19 Tuesday, December 3rd?

20 MR. GEISLER: Civil Rights Division. I'm  
21 available that date, Your Honor.

22 THE COURT: Okay. Seeing nobody else who wants to  
23 make any objections on that date, any preferences for  
24 morning or afternoon? This may be a several-hour hearing.  
25 It may not be. I don't know. But I'll give you a couple of



1 hours if you need it. Any preference on the morning or  
2 afternoon?

3 MS. BROWN: United States has no preference.  
4 Morning, I guess, would be preferable, as far as travel  
5 involved from D.C., but --

6 THE COURT: Let's schedule it -- hearing nobody  
7 else, so let's schedule Tuesday, December 3rd, 10:00 a.m.  
8 I'll give you two hours that morning for oral argument.

9 And as you think about when a trial date might be, this  
10 was looking to me like it really should be the following  
11 summer, or so, a couple of months of discovery. I don't  
12 know whether anyone is going to have a summary judgment or a  
13 partial summary judgment motion, but we can do those fairly  
14 quickly. But it's looking to me like sometime summer of  
15 2014 for a trial. But you all can talk among yourselves and  
16 give that some thought and let me know if you can agree on  
17 something and what your preferences are.

18 Is there anything else we need to or should cover in  
19 this morning's hearing? Let me start with the Government,  
20 the U.S.

21 MR. GEISLER: Your Honor, this is Jonas Geissler,  
22 from the Civil Rights Division, again. May I take it that  
23 the parties may hold off on doing 26(a) disclosures until  
24 after Your Honor's opinion on this additional briefing so  
25 that we have a better understanding of the scope of the

1 hearing?

2 THE COURT: Yes. As a matter of fact, this  
3 district generally has a practice of the parties stipulating  
4 to waiving 26(a) disclosures and moving directly into  
5 traditional forms of written and deposition discovery.

6 I don't think there's been a waiver filed here. Let me  
7 know if there's a problem along those lines; but generally,  
8 yes, I'm not expecting 26(a) disclosures to be made right  
9 now. Let me know if the parties will or will not be waiving  
10 26(a), but you don't have to do that right now.

11 MR. GEISLER: Thank you, Your Honor. Nothing  
12 else from the Civil Rights Division today.

13 MS. BROWN: Nothing else, Your Honor.

14 THE COURT: From the City?

15 MS. OSOINACH: I just have one clarifying question  
16 I think would be helpful for my clients. On the issue of  
17 the PPA intervening on the merits in the City's  
18 decision-making with regard to how it will defend on  
19 liability, is -- am I hearing from the Court that regardless  
20 of whether or not the City chooses to defend on liability,  
21 that the Court is inclined to believe that the PPA may  
22 intervene on the merits? So what I'm asking is if the City  
23 were to choose to defend on liability, would we be  
24 partnering with the PPA? Is that the Court's inclination?

25 THE COURT: Sure. My -- my -- the way I'm looking

1 at it now, and it's subject to reading the briefs again or  
2 reading any additional arguments folks want to make. I'm  
3 inclined to think that the PPA should be allowed to  
4 intervene on liability. I will look at arguments or  
5 additional arguments folks want to make, but that's how I'm  
6 tentatively looking at it.

7 That said, it's entirely possible that the City may or  
8 may not want to defend on liability, in whole or in part,  
9 and may end up agreeing, or disagreeing, on many issues or  
10 even on some issues with respect to the PPA, defending on  
11 liability if they're able to defend on liability. And, you  
12 know, the good news is it's a bench trial, not a jury trial,  
13 so if things get a little cumbersome, so be it. I can deal  
14 with it. If the City wants to take certain positions on  
15 liability issues that are different from the PPA's position  
16 on liability issues, so be it.

17 My job is to come up with the legally and factually  
18 correct answer under the law, and, based upon evidence as it  
19 is presented to me and as I see it. Everyone -- all the  
20 parties to this case are simply here to both represent their  
21 client's interests and to provide their client's  
22 perspectives on the evidence and on the law to the Court, as  
23 the Court fulfills its responsibility.

24 And if the City and the PPA agree on some issues or  
25 disagree on other issues, either legally or factually, so be

1 it. If the City wants to present some witnesses on which  
2 the PPA does not want to cross-examine, so be it. If the  
3 City doesn't want to present certain witnesses, but the PPA  
4 does, so be it. We'll deal with it. Everybody -- if the  
5 PPA is allowed full intervener status as a defendant  
6 intervener, then they would have a right to present their  
7 defense just as in any other civil case where we have two  
8 defendants who may have some areas in common and some areas  
9 where they disagree. And sometimes they even assert cross  
10 claims against each other and point the finger at each  
11 other. So be it. The Courts are used to that.

12 Does that answer your question?

13 MS. OSOINACH: Yes. Thank you.

14 THE COURT: Anything else from the City I should  
15 address today?

16 MS. OSOINACH: No.

17 THE COURT: Mr. Karia, anything else from the PPA  
18 I should address?

19 MR. KARIA: No, sir. Thank you.

20 THE COURT: Thank you. Ms. Albies and  
21 Ms. Curphey, anything else from AMA Coalition?

22 MS. ALBIES: No. Thank you.

23 THE COURT: Thank you all very much. I look  
24 forward to receiving your opening brief on October 21st. If  
25 anyone needs the assistance of the Court on any other issues

1 that may come up in the meantime, I will make myself  
2 available for you on an expedited basis. Just let my  
3 courtroom deputy know by email or by phone that you need me,  
4 or file a motion that you need me. Absent a written motion,  
5 let us know, and we'll be there to assist.

6 Thank you all.

7 DEPUTY COURTROOM CLERK: Court is in recess.

8 (Hearing concluded.)  
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## C E R T I F I C A T E

1  
2  
3 UNITED STATES OF AMERICA, )  
4 )  
5 Plaintiff, ) Case No. 3:12-CV-2265-SI  
6 )  
7 v. )  
8 )  
9 CITY OF PORTLAND, )  
10 )  
11 Defendant. )  
12 )  
13 \_\_\_\_\_ )  
14 )

15 I certify, by signing below, that the foregoing is  
16 a true and correct transcript of the record of proceedings  
17 in the above-entitled cause. A transcript without an  
18 original signature, conformed signature, or digitally signed  
19 signature is not certified.  
20

21 /s/Jill L. Erwin, CSR, RMR, RDR, CRR  
22 \_\_\_\_\_  
23

24 Official Court Reporter  
25

Date: August 19, 2013